



January 27, 2010

**ANALYSIS OF NEWLY RELEASED DEPARTMENT OF ENERGY REGULATION ON WEATHERIZING
AFFORDABLE MULTIFAMILY HOUSING**

On January 25, 2010, the Department of Energy (DOE) published a new regulation in the Federal Register amending the eligibility provisions applicable to multi-unit buildings under the Weatherization Assistance Program (WAP). SAHF, and many other organizations, previously submitted comments on the Notice of Proposed Rulemaking (NOPR) in July 2009. In our comments, we urged DOE to abolish many of the barriers that historically prevented the effective weatherization of multifamily housing. DOE directly responded to SAHF's comments in the new regulation, adopting some suggestions and highlighting others, possibly to give additional guidance to States on matters where DOE elected not to modify the regulations.

Listed below are some of the sections in which DOE directly addressed our comments and provided substantive responses. This is not a summary of all the major provisions discussed in the regulation, but rather an analysis of the impact of some of the major themes SAHF emphasized in our comments. At the risk of being self-congratulatory, we believe our comments and DOE's responses confirm our belief that SAHF plays an important role in helping set Federal policies that impact its Members.

Attached for reference are (1) a copy of the regulation published in the Federal Register and (2) SAHF's comments on the NOPR submitted in July 2009.

I. DOE accepted HUD Income Verification procedures for multifamily buildings.

The main benefit of this determination is that property owners, tenants, and subgrantees (Weatherization Service Providers--WSPs) no longer need to undertake the costly, time-consuming process of verifying the incomes of all multifamily tenants in a building receiving weatherization funds. Prior to the promulgation of this regulation, owners and subgrantees needed to document the incomes of all of the building's tenants, which, in many large

multifamily buildings, added overhead costs and slowed down the weatherization process. Accepting HUD's income verification procedures will allow for a cheaper, faster process that will decrease overhead costs and thereby increase the amount of funds spent on actual energy improvements in the building. SAHF's comments supported this approach.

II. DOE did not raise the qualifying income ceiling for low-income tenants.

Although DOE never mentioned this in the NOPR, some commenters urged DOE to raise the allowable income threshold of tenants under WAP to the National Housing Act accepted definition of "low-income."¹ The commenters argued this would expedite the process, but the reality is that it also would enable more lower-income, but not necessarily the lowest-income people, to access WAP funds. This likely would increase the available pool of tenants beyond the very low-income pool and likely be something SAHF and SAHF Members would not favor. DOE did not accept the suggestion.

III. Section 221(d)(3) BMIR and Section 236 Properties are excluded from the list only if fewer than 66% of their units have project-based Section 8.

DOE allowed the properties previously excluded from the Qualified Assisted Housing list in the NOPR to be added on if they have at least 66% of their units as project-based Section 8. SAHF's comments supported this approach.

IV. DOE accepted that under the Qualified Assisted Housing program, tenants rents are capped at 30% and therefore cannot be increased due to weatherization.

SAHF directly stated this in our comments and DOE accepted our reasoning.² However, DOE imposed an additional condition: properties with rent restrictions expiring in less than three years are not qualified automatically for the pre-qualified list. Essentially HUD will "segregate" its list to include properties with rent restrictions beyond three years and those with rent restrictions expiring in less than three years. The properties with less than three years left will be subject to State scrutiny to determine whether or not to allow weatherization work to be done. The buildings with more than three years automatically will satisfy the income and undue enhancement requirements.

¹ See Weatherization Assistance Program for Low-Income Persons, 75 Fed. Reg. 3847, 3850 (Jan. 25, 2010) (amending 10 C.F.R. § 440)[WAP Regulation].

² See SAHF's Comment Letter, p. 2; see also, WAP Regulation, at 3851.

V. DOE did not accept SAHF's reasoning that for the purpose of considering whether there are sufficient safeguards from rental increases, LIHTC properties should receive the same treatment as Qualified Assisted Housing.

Although DOE directly highlighted our comments on this matter, they did not adopt an automatic satisfaction of this standard for LIHTC properties.³ DOE also responded to our alternate suggestion for LIHTC properties to covenant not to increase rents for a reasonable time after weatherization work is completed, though it declined to adopt our proposal on a national scale.⁴ Instead, States are authorized to establish their own rent control preconditions for entry of LIHTC properties into the program. We believe DOE's express recitation of our comments on this issue was designed to provide guidance to States on acceptable approaches.

VI. DOE did not accept our suggestion that LIHTC properties automatically satisfy the no undue or excessive enhancement standard.

DOE addressed our suggestion that LIHTC properties satisfy the no undue or excessive enhancement standard as well. Although they directly cited our argument (and actual language) that "the existence of maximum rental rates and long-term use restrictions in LIHTC properties act as strong disincentives to undertaking excessive enhancements," they failed to accept our proposal on a national scale.⁵ They also referenced our alternative suggestion that excessive enhancement could be defined by "reference to a savings to investment ratio over the lifecycle of the improvement," but again failed to accept this proposal on a national scale.⁶ Instead, DOE left it to the States to determine what additional conditions/determinations need to be done to include LIHTC properties. Here, we again believe DOE expressly referenced our suggestions to give States guidance as to how they might consider the issue.

VII. DOE accepted many of our suggestions for demonstrating that the benefits of weatherization accrue to low-income tenants.

DOE cited SAHF's various proposals for satisfying the standard of demonstrating the benefits of weatherization accrue to low-income tenants and accepted them all.⁷ DOE explicitly referenced SAHF's suggestions numerous times in this section and stated that any of these could be considered on the State level to satisfy the standard. However, DOE did not impose a national standard. Instead, States will determine whether or not an owner has met the standard.

³ See SAHF's Comment Letter, p. 2-3; *see also*, WAP Regulation at 3852.

⁴ See SAHF's Comment Letter, p. 3; *see also*, WAP Regulation at 3852.

⁵ See *Id.*

⁶ See *Id.*

⁷ See SAHF's Comment Letter, pp. 3-4; *see also*, WAP Regulation at 3853.

DOE did assert that States could accept any number of reasons, including our suggestions of property preservation, long-term affordability restrictions, or healthier living environments, as meeting the standard. DOE may publish a non-inclusive list of all the ways in which owners can satisfy these criteria, which States can reference to establish their own standards.⁸ DOE referenced the standards established by Washington State as a successful example.

VIII. States may require financial participation by multifamily property owners.

DOE did not abolish the regulatory provision allowing States to require owner contribution to the costs of weatherization in multifamily buildings. This is a State-by-State determination. However, DOE released WAP program guidance in March 2009 encouraging States to abolish, albeit temporarily, owner contribution requirements for weatherization work in MF buildings when using ARRA funds because of the need to spend the increased funds expeditiously.⁹ Some, but not all, states have adhered to DOE's suggestion in their ARRA WAP State Plans.

IX. No mandatory State set-aside or prioritization for MF buildings.

SAHF actively encouraged DOE to require States to establish a statewide multifamily set aside from their total WAP allocation, but DOE did not accept our proposal.¹⁰ Instead, DOE accepted the arguments of a CAP agency that argued “the decision on what types of dwellings to weatherize remain a local one” because local agencies are most familiar with the needs of their communities.¹¹

⁸ See WAP Regulation at 3853.

⁹ See U.S. Dept. of Energy, *Weatherization Program Notice 09-1B 9* (Mar. 12, 2009).

¹⁰ See SAHF's Comment Letter, p. 5.

¹¹ See WAP Regulation at 3854.